PATRICIA A. CUTLER, Assistant U.S. Trustee (#50352)
STEPHEN L. JOHNSON, Trial Attorney (#145771)
EDWARD G. MYRTLE, Trial Attorney (DC#375913)
MARGARET McGEE, Trial Attorney (#142722)
U.S. Department of Justice
Office of the United States Trustee
250 Montgomery Street, Suite 1000
San Francisco, CA 94104
Telephone: (415) 705-3333
Facsimile: (415) 705-3379

Attorneys for United States Trustee
Linda Ekstrom Stanley

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	No.	01-30923 DM
PACIFIC GAS & ELECTRIC COMPANY,	Chapter	11
Debtor.	Date:	May 18, 2001
	Time:	10:00 a.m.
	Place:	235 Pine St., 22nd Floor San Francisco, California

UNITED STATES TRUSTEE'S OBJECTION TO PG&E'S MOTION TO VACATE THE APPOINTMENT OF THE OFFICIAL RATEPAYERS COMMITTEE

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INTRODUCTION

The U.S. Trustee's appointment of a ratepayers' committee is well within her discretion under Bankruptcy Code §1102. Ratepayers have contingent claims for rate rebates under state law based on PG&E's pre-petition conduct and potential over-charges. These claims alone make them creditors of this estate. Unlike other creditors, ratepayers also have a continuing right to PG&E's performance based on the company's state law duty to serve and supply power. Ratepayers' financial interests are at stake because it is possible, if not certain, the conduct of this case including asset sales, assumption and rejection of contracts, claim reviews and settlements, and the legal steps PG&E takes to obtain this court's approval of these matters as well as a plan will affect service and customer rates.

I. UNDER NINTH CIRCUIT AND OTHER RELEVANT AUTHORITY, THIS COURT HAS LIMITED OR NO AUTHORITY TO ABOLISH A COMMITTEE APPOINTED UNDER § 1102.

While PG&E requests this court review the U.S. Trustee's appointment of the Official Committee of Ratepayers under an "abuse of discretion" standard, the Bankruptcy Appellate Panel has severely constrained the bankruptcy court's ability to alter committee appointments. *In re Wheeler Technology, Inc.*, 139 B.R. 235, 239 (Bankr. 9th Cir. 1992). In *Wheeler*, the BAP overturned a bankruptcy court decision removing a creditor from a committee as a sanction, saying "[t]he power to appoint or delete members of the Creditors' Committee now resides exclusively with the U.S. Trustee." *Id.* This statement suggests the standard of review is more narrowly constricted than abuse of discretion.

PG&E has not cited any case standing for the proposition that the Bankruptcy Court can abolish or "vacate" the U.S. Trustee's appointment of a creditors' committee as an abuse of her discretion under § 1102.[1/] The only court to consider squarely whether a

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[1/] The case cited by PG&E, *In re Mercury Finance Co.,* 240 B.R. 270 (N.D. Ill. E.D. 1999), does not stand for the principle that the court can do away with a committee entirely. The district court upheld the bankruptcy court's order that U.S. Trustee reconstitute a "blended" committee into two committees. The court was concerned with appropriate representative membership, not whether the committees should exist at all. In *In re Texaco Inc.,* 79 B.R. 560 (Bankr.. S.D.N.Y. 1987), the court ordered two committees merged. Again the issue

bankruptcy court may abolish or vacate the appointment of a creditors' committee held it lacked such authority. In *In re New Life Fellowship Inc.*, 202 B.R. 994, 996-997, (Bankr. W.D.Okla. 1996), the court was faced with a motion to abolish a committee appointed by the U.S. Trustee. The *New Life* court ruled:

> In this case both the specific language and the legislative history of section 1102(a)(1) compel the conclusion that the court it *(sic)* is without power to abolish the committee.
>
> ...
>
> With Congress placing the exclusive authority to appoint committees in the hands of the United States trustee, the question posed by the motions actually is whether 11 U.S.C. 105(a) grants the courts the power to substitute their judgment for that of the United States [T]rustee.
>
> ...
>
> The "provision" at issue here is section 1102(a)(1) which is absolute in its language and deprives the court of any discretion concerning appointment or abolition of committees leaving no room for application of section 105(a) to override the act of the United States Trustee.

Id. at 996-97.

Relying on *In re Rick Pierce*, 237 B.R. 748 (Bankr. E.D. Cal. 1999), PG&E urges the court rely on two bankruptcy *rules* as support for the conclusion the court may abolish a committee appointed by the U.S. Trustee under authority of a *statute*.[2] PG&E cites Rules 2020 and Rule 9014 for this remarkable proposition but, because they are rules, neither can give rise to a substantive right. The first, Rule 2020, provides, "A proceeding to contest any act or failure to act by the United States trustee is governed by Rule 9014." No reading of that rule suggests it empowers the court to undo a proper appointment by the U.S. Trustee

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was representative membership. No committee was completely abolished. Here the court has not been asked to divide or merge committees, and, as set forth below, the ratepayers cannot be merged with the unsecured creditors committee.

[2] The U.S. Trustee disagrees with PG&E's conclusion *Pierce* is well-reasoned. The rule enunciated in *Pierce* is that the court has the authority to review the appropriateness of the appointment of a specific member of a creditors' committee at least in part under Rule 2007. But that rule was inapposite – it permits a court to review the appointment of a *pre-petition* creditor's committee by the U.S. Trustee. It had no application to the facts in *Pierce* because there was no pre-petition committee, and it has no application here. In any event, the bankruptcy court's decision in *Pierce* squarely conflicts with the BAP's decision in *Wheeler Technology*.

under the controlling statute, § 1102. The rule simply says that if a challenge issues, it is made under Rule 9014, an unexceptional and entirely procedural conclusion. Rule 2020 provides only a procedure for review using Rule 9014, *if review is otherwise authorized*. Here review is not authorized.

II. RATEPAYERS ARE CREDITORS WITH CONTINGENT CLAIMS AND HAVE ADDITIONAL FINANCIAL AND EQUITABLE INTERESTS ENTITLING THEM TO SERVE ON A COMMITTEE

A. Ratepayers are Creditors.

1. The Definition of Claims is Expansive and Includes Contingent Claims.

Under Section 1102(a)(1), the United States Trustee has authority to appoint additional committees of creditors.[3/] A creditor is defined in section 101(10) as: "[an] entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;"

A "claim" is defined under section 101(5) as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, *contingent*, matured, *unmatured*, disputed, undisputed, legal, *equitable*, secured, or unsecured; or
>
> (B) *right to an equitable remedy for breach of performance* if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

[Emphasis added.]

The courts read "claim" expansively to serve the policy of inclusion to resolve all possible matters in a Chapter 11 case. In *In re Johns-Manville,* 36 B.R. 743 (Bankr.S.D.N.Y. 1984), the court defined "claim" broadly to include the unknown contingent

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[3/] Section 1102 (a)(1) provides -

> Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States Trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States Trustee deems appropriate.

claims of asbestos tort victims who were exposed pre-petition, but would manifest the disease only after the debtor's reorganization:

> In enacting the Bankruptcy Code, Congress specifically intended to afford the broadest possible scope to the definition of "claim" so as to enable Chapter 11 to provide pervasive and comprehensive relief to debtors. The legislative history of section 101(4) [now § 101(5)] explains:
>
> The effect of the definition [of claim] is a significant departure from present law [the former Bankruptcy Act]. Under present law, claim is not defined in straight bankruptcy....
>
> The definition in paragraph (4) adopts an even broader definition of claim .... The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, legal, equitable, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured .... The definition also includes as claim an equitable right to performance that does not give rise to a right to payment. By this broadest possible definition and by the use of the term throughout title 11, especially in subchapter I of chapter 5, the bill [Bankruptcy Code] contemplates that all legal obligations of the debtor no matter how remote or contingent will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.
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> House Report. No., 95-595 to accompany H.R. 8200 9th Cong., 1st Sess. 309(1977), pp. 308-314, U.S. Code Cong. and admin. news 1978, pp. 5787, 6265 - 6271 (omitting emphasis in original).

Id. 36 B.R., at 754-55, fn. 6.

In *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198, 202-03, (4th Cir.), *cert. dismissed*, 487 U.S. 1260, 109 S.Ct 201, 101 L.Ed. 2d 972 (1988), a court again reads "claim" expansively, holding that, while the state law giving rise to a claim is triggered by the disease's manifestation, a victim who manifests symptoms after the bankruptcy filing holds a claim in the bankruptcy and will not be given relief from stay to go to state court:

> The legislative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in bankruptcy. The Code contemplates the broadest possible relief in the bankruptcy court.
>
> * * *
>
> *Blacks Law Dictionary*, 5th Ed., 1979, defines "contingent" as follows, and we adopt this definition, there being no indication that Congress meant to use the word in any other sense:

> Contingent. Possible, but not assured; doubtful or uncertain; conditioned upon occurrence of some future event which is itself uncertain, or questionable. Synonymous with provisional. This term, when applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no present interests exists, and that whether such interest or right ever will exist depends upon a future uncertain event.

Id. at 202.

In *In re Dow-Corning*, 194 B.R. 121 (Bankr. E.D. Mich. 1986), pursuant to § 1102, the court ordered the appointment of an additional committee based on attenuated contingent claims of physicians who *might* have claims against Dow for contribution, if Dow's tort victims were successful in their suits against them.

> These claims, even if the contingencies are removed, are disputed by the Debtor.
>
> Given that committees have been ordered for future claimants, priority claimants and others whose ability to currently vote a claim is problematical or non-existent, it appears that there is no legal reason why a committee for persons with contingent claims cannot be ordered.

Id. at 145.

Under the expansive scope given "claim" in the Code, the legislative history of the Code, and by the courts, if PG&E ratepayers have contingent claims, they are creditors entitled to a committee.

2. PG&E's Ratepayers Have Contingent Claims

PG&E's ratepayers have a number of contingent claims:

1. *Utility obligation*. PG&E enjoys a state-granted monopoly for providing electric service to consumers in its service area. In exchange, it has a legal obligation to provide full and adequate service to its customers -- its utility obligation to serve. Cal. Pub. Util. Code § 451. Although the State of California has temporarily assumed a procurement role, Cal. Stats. 2001, ch. 4, neither that legislation nor this bankruptcy filing has extinguished PG&E's utility obligation. *Southern California Edison Co.* (2001) Cal. P.U.C. Dec. No. 01-01-046 at 7 ("State law clearly requires utilities to serve their customers, and a threatened bankruptcy filing or threat of insolvency does not change that obligation.") appended to the *Declaration*

of Patricia A. Martin in Support of the U.S. Trustee's Opposition (the "Martin Decl.") Exhibit A. Customers of the utility have a right to continued performance. PG&E may have breached and may continue to breach that obligation by failing to provide sufficient power to meet its load and thereby failing to avoid blackouts. Customers may have suffered damages as a result of the sudden blackouts and have claims against the utility for those damages. Cal.Pub.Util. Code § 2106. The acts and omissions causing these damages may also constitute unfair business practices, giving rise to a claim for civil penalties, disgorgement, and other relief under state law. Cal. Bus. & Prof. Code §§ 17200-17210.

2. *Inter-affiliate transfers.* PG&E's bankruptcy filing follows more than two years of highly successful operations under the State's deregulation law when billions of dollars in profits for so-called "stranded investments" were transferred to debtor's parent corporation. These transfers have been reported by independent audits of the utility's financial condition, and are the subject of a California Public Utilities Commission (CPUC) investigation into possible lack of compliance with earlier CPUC orders on the formation of utility holding companies. *Order Instituting Investigation Whether Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and Their Respective Holding Companies, PG&E Corporation, Edison International, and Sempra Energy, Respondents, Have Violated Relevant Statutes and Commission Decisions, and Whether Changes Should Be Made to Rules, Orders, and Conditions Pertaining to Respondents' Holding Company Systems* (2001) Cal. P.U.C. No. 01-04-002. Martin Decl., Exhibit B. The transfers may have contributed to PG&E's claimed cash-shortage and the breach of its utility obligation, as may the holding company's failure to restore capital to the debtor. *See id.* at 15-16 (noting holding companies' obligation, under prior CPUC decision, to give "first priority" to utilities' capital needs to discharge utility obligation to serve, and ordering utilities to show cause why they failed to infuse capital as the utilities' financial conditions deteriorated and to show cause "why their evident failure to provide sufficient capital to their utility subsidiaries . . . did not violate . . . the 'first priority' condition" of that

decision). Ratepayers may be more interested than other creditors in seeing the company's debts paid out of its profits from the early years of deregulation as well as pursuing their remedies for the consequential breach of debtor's utility obligation.

3. *Lost generator refunds*. Debtor alleges unjust and unreasonable rates were charged by power-generators, and federal regulators failed to protect it from those charges, as being unlawful and improper. Debtor may have administrative and judicial remedies to recover overcharges. Any such recoveries will inure to the benefit of the estate; however, the CPUC recently found PG&E has not vigorously pursued those remedies. *Southern California Edison Co.* (2001) Cal. P.U.C. Dec. No. 01-03-082 ("D.01-03-082"), at 15-18. Martin Decl., Exhibit C. Ratepayers may have more interest in seeing those claims pursued than other creditors, including power-generators who may be the target of those claims.

4. *Refunds on rate increases*. The CPUC has explicitly stated the recent rate increases are subject to refund under certain circumstances. First, if PG&E uses the revenues from recently-approved rate components to pay for any of its costs besides future power purchases, the revenues will be subject to refund. *Id*. at 15-17. Martin Decl. Exhibit C. Second, to the extent power generators and sellers make refunds to PG&E for over-collections, these refunds may be passed through to ratepayers. *Id.* at 15-18. Finally, the CPUC may revoke the rate increases if the utilities do not actively seek to reduce the financial burden caused by the purchase of power at unjust and unreasonable prices. *Id*. Under any of these circumstances, PG&E's ratepayers have contingent claims for refund of rate components they were and are required to pay.

5. Surcharge refunds. PG&E has in the past been authorized to add rate surcharges for specific purposes, such as enhancing transmission and distribution system safety and reliability, Cal. Pub. Util. Code § 368 (e), managing vegetation on utility property, *Pacific Gas and Electric Company* (2000) Cal. P.U.C. Dec. No. 00-02-046 ("D. 00-02-046") (Martin Decl., Exhibit D), and increasing revenues as an interim attrition increase of approximately $190 million for 2001, *Pacific Gas and Electric Company* (2000) Cal. P.U.C.

Dec. No. 00-12-061 ("D. 00-12-061"). Martin Decl. Exhibit E. Each of these surcharges is subject to refund to ratepayers if the CPUC determines it was not expended as authorized.

6. *Right to Surplus funds*. PG&E holds funds collected from ratepayers under CPUC tariffs that directed those funds be applied exclusively to various public-benefit purposes such as conservation programs and nuclear decommissioning. Some of those funds will not be fully expended for those purposes. Ratepayers more than others creditors may be interested in seeing those funds used as provided by law or refunded to ratepayers.

This list of the ratepayers' contingent claims is not exclusive, but it demonstrates ratepayers are creditors and as creditors entitled to serve.

B. The Ratepayers' Rights to Continuing Utility Service Should Entitle Them to Representation as an Official Committee

1. Ratepayers Are Not Concerned Solely with Payment by the Bankruptcy Estate – They are Also Concerned About Continuing Utility Service

In addition to pre-petition claims for review of interim rate decisions before the CPUC and potential rebates, ratepayers are entitled to continuing service under state law. Cal. Pub. Util. Code § 451. Ratepayers have a present and future financial stake. Rates and services may, and likely will, be impacted by the decisions of this court and any plan proposed. Creditors having concerns about future performance and reorganization alternatives are legitimately represented on committees.

In *In re Altair Airlines*, Inc., 727 F.2d 88 (3rd Cir. 1984), the court recognized that the pilots union had a legitimate interest in serving on the creditors' committee based not only on the past wage claims of their members, but also on their concern over their future financial stake in employment:

> Undoubtedly ALPA's [Airline Pilots Associations] members may be interested in a plan of reorganization which preserves both their jobs and their collective bargaining agreement, while other creditors may be interested in liquidation, or reorganization involving merger with a non-union airline. Such conflicts of interest are not unusual in reorganizations.
>
> Section 1103(c)(2) contemplates that the Creditors' Committee may "investigate the acts, conduct, assets, liabilities, and

> financial condition of the debtor, the operation of the debtor's business, *and the desirability of the continuance of such business..."* (emphasis supplied). There is no reason why the voice of the collective bargaining representative should be the one claimant voice excluded from the performance of that statutory role.

Id. at 90.

In that case the court also decided the pension fund had a contingent claim and could serve on the committee even though it would not have a claim unless the debtor took certain actions in the future, i.e., if the debtor were to withdraw from the multi- employer pension fund. *Accord In re Barney's Inc.,* 197 B.R. 431, 440 (Bankr. S.D.N.Y. 1996).

2. Ratepayers' Interest in Continuing Utility Service Makes Their Interests Distinct from the Other Creditors

Ratepayers have contingent pre-petition claims that can be reduced to a right to payment and are therefore creditors. The distinct interests of the ratepayers mandates the appointment of a separate committee. Their interests cannot be reconciled with those of the unsecured creditors committee. The ratepayers' right to continuing service and the possibility they will be asked to fund a plan that pays PG&E's creditors and shareholders' put them at odds with the unsecured creditors.

In *Dow-Corning,* 194 B.R. at 144-46, when the court decided to add a separate committee of physicians who might have claims for contributions against the debtor if the debtor's tort victims were successful in suing them, the unsecured creditors committee "assured the physicians that if they are found to have actual claims, the committee will honor its fiduciary duty to them." The court found, however, the physicians would not be protected by the creditors committee:

> First, the tort claimants have sued the physicians. The interests of the Debtor as co-defendant with the physicians and of the commercial creditors stand with the physicians against the tort claimants. If the physicians' liability is established, the Debtor has an interest in showing that the action of the physicians alone caused the harm to the tort claimants and vice versa. The commercial claimants' interest is with the Debtor but against the physicians at this point

Id. at 145.

Similarly, in *Johns-Manville*, 36 B.R.at 748-49, the creditors' committee representing present tort victims opposed the creation of the separate representative for future victims on the ground they were represented by the current victims committee. The court rejected this argument. Future victims had a conflict with the present victims and needed separate representation:

> [F]uture claimants are indeed the central focus of the entire reorganization. Any plan not dealing with their interests precludes a meaningful and effective reorganization and thus inures to the detriment of the reorganization body politic.
>
> * * *

> [N]one of the existing committees of unsecured creditors and present asbestos claimants represents this key group, a separate and distinct representative for these parties in interest must be established so that these claimants have a role in the formulation of any plan.

Id. at 749.

* * *

> The empty chair in these proceedings can and must be filled to give this affected group more than the empathetic consideration it currently receives from other participants in the reorganization.
>
> Much of the opposition expressed by the constituencies in this case is concerned with the mechanical difficulties of appointment, *i.e.*, the fairness of single representative or the lack of a specifically defined role. The Unsecured Creditors Committee argues that if a representative can be appointed, it should not be a solitary representative, but rather a committee of persons representing this group.

Id. at 757. In a later decision regarding the status of the legal representative, the court noted:

> The Legal Representative was endowed upon his appointment with the full panoply of statutory rights and duties of representation available to an official committee under the Code.

In the Matter of Johns-Manville, 68 B.R. 618, 626-27.

The distinct interests of the ratepayers in this highly public case mandate a separate committee to represent them. *Cf., In re UNR Industries, Inc.* 46 B.R. 671 (Bankr. N.D. Ill. E.D. 1985)(court held debtor's future victims required a separate legal representative, a disinterested person to be selected by the U.S. Trustee); *see also In re Amatex Corp*., 755 F.2d 1034 (3d Cir. 1985).

3. PG&E's Attack on the Validity of the Committee Relies Primarily on a Case That Does Not Support its Position

PG&E relies heavily on *In re Eastern Maine Elec. Co-op., Inc*., 121 B.R. 917 (Bankr.D.Me. 1990), which contradicts its position. In that case, the court stresses the need to go beyond labels ("customer" or "ratepayer") and examine the entire relationship and financial aspects of the parties in determining committee eligibility. The case did not involve a challenge to the United States Trustee's appointment decision. It involved a motion for

the appointment of an additional committee of co-op members. The court determined the members were eligible to serve, but denied the motion as untimely. The court applied broad definitions of "claim" and "equity security." The court found the co-op members were eligible for committee appointment under § 1102 as creditors because, like the PG&E ratepayers, they had many potential claims, and as equity security holders because their ownership interests were substantially similar to equity security interests.

> Although the objecting parties would have us focus on their (co-op member) status as customers and reject formation of a committee out of hand, it is clear that the members have other substantial interests that are at stake in this reorganization.

Id. at 930.

Rather than supporting PG&E's argument, the *Eastern Maine Electric* case supports the U.S. Trustee's position. Customers who are ratepayers with contingent claims may properly constitute a committee.

III. RATEPAYERS CANNOT LOOK SOLELY TO THE CPUC AND §1129(a)(6) TO PROTECT THEIR CLAIMS AND INTERESTS

Some of the contingent claims just articulated can arguably be brought before the CPUC; however, the ratepayers cannot look solely to the CPUC for protection. PG&E is seeking to revisit CPUC decisions before this court. PG&E and its creditors will undoubtedly continue to take actions in this case that may have the effect of limiting the State's regulation of rates and service. The court's decisions and the actions of creditors and PG&E on contracts, performance obligations, disposition of assets as well as the shaping of a plan may affect ratepayers before the CPUC is asked to look at any plan's proposed rates.

The nickle version of this case says ratepayers will be protected by the processes employed by the CPUC and ratepayer advocates when any rate increase is brought to the CPUC for approval at the conclusion of the chapter 11 case. This version suggests § 1129(a)(6), which compels CPUC approval for any rate changes, is Congress's statutory

nod to California's regulatory process. In this world, ratepayers simply need to stand by and wait for the outcome of the bankruptcy case when rates will be subjected to CPUC scrutiny.

This analysis is dangerously incomplete because it assumes the "rate" customers pay is devised in some abstract way, divorced from the company's business circumstances and market conditions. It assumes the "rate" will be selected in a factual vacuum. Nothing could be further from the truth. The "rate" PG&E's customers' pay is a function of the company's economics and the energy market itself. The "rate" is not pulled from thin air on a given date but is derived from many factors unique to the company and its industry. These factors include the cost of the company's capital improvement plan, energy costs, the existence of rebate programs, the purchase and sale of real and personal property, the recoupment of stranded costs, and the utility's conduct.

The court should be aware PG&E's current contest with the CPUC stems from two principal disputes, both of which may be dealt with in this bankruptcy case: (1) did the utility's upstreaming of funds to its parent corporation in any manner or amount violate its duty to serve the public or its creditors and (2) does the current market value of its assets or certain of its assets provide sufficient recovery of stranded costs to allow for the lifting of the rate freeze?

Many steps PG&E will take in this chapter 11 will directly affect the rates PG&E's customers pay. Just one example will illustrate this point. PG&E has indicated publicly it has some interest in selling its hydroelectric assets, and it has valued these assets in the billions. If these assets were sold, PG&E might argue the rate freeze imposed by AB1890 in 1996 no longer applies because the company would have recovered its stranded costs of $7 billion.

What will happen if PG&E applies to the bankruptcy court for permission to sell these assets? Under ordinary circumstances presented in a commercial bankruptcy case, the court would have to determine whether the company had exercised appropriately its business judgment and whether the price was fair under the circumstances. Whether that analysis would be the correct one in PG&E's bankruptcy case is not certain. What is certain

is ratepayers have a significant stake in the outcome of that determination because of the direct and substantial effect such a sale would have on rates.

IV. ASSOCIATIONS REPRESENTING RATEPAYERS MAY APPROPRIATELY SERVE AS MEMBERS OF THE COMMITTEE

A. Case Law Supports the Appointment of Representatives for Creditors

PG&E concedes the U.S. Trustee can appoint creditor representatives to a committee. Despite the lack of a specific reference in the Bankruptcy Code to representatives, representatives of creditors have often been permitted to serve on committees. See *In re Dow Corning Corp.,* 212 B.R. 258 (E.D. Mich. 1997).

The type of representative most often designated by the U.S. Trustee to serve on a creditors' committee is the creditor's attorney. In other cases, as PG&E concedes, representatives of classes of creditors may serve, including indenture trustees and labor unions.

The appropriate representatives for claimants may not necessarily be the claimants themselves, or their agents or attorneys, especially in a unique case. Representatives of class action litigants were held to be the appropriate representatives for tort victims where these lawyers had expertise in the procedural and legal bases for these unique nationwide classes of claimants. *In re Dow Corning Corp*., 212 B.R. 258 (E.D. Mich. 1997). The district court reversed the bankruptcy court's removal of class action attorneys from the tort victims' committee:

> Section 1102(b)(1) appears to give the United States Trustee a "guide" to the type of persons the Trustee may appoint on the committees. Section 1102(b)(1) provides that "ordinarily" the membership of a committee should consist of the seven largest creditors of the creditor class. It could be interpreted that in a matter that is *not* an "ordinary" case, such as a mass tort case, the United States Trustee may appoint members who are not the largest creditors. Section 1102(b)(2) does *not* provide a definition of "persons" to be appointed, other than a person who is "willing to serve." Nowhere in Section 1102 does it indicate that a person must be an actual creditor to be appointed by the United States Trustee to a committee of creditors.

Id. at 264.

In another context almost as extraordinary as this one, the court recognized the need for representation of the class of those who may have only contingent claims in the future. In *Johns-Manville,* 36 B.R., at 757-59, the legal representative for the future tort victims was a person with no prior relationship with the contingent creditors. His sole connection to the future victims was to act as their fiduciary in the case with the powers and duties of a committee. *In re Matter of Johns-Manville,* 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986). *Accord*, *In re UNR Industries, Inc.,* 46 B.R. 671, 675-76 (Bankr. N.D. Ill. E.D.1985). The reasoning in these cases supports the view that in this case, the group of organizations the United States Trustee appointed to the Official Committee of Ratepayers can act as fiduciaries for the ratepayer body as a whole and be the appropriate representatives for the various PG&E ratepayer constituencies.

B. The State Attorney General Is Asserting Sovereign Immunity and Not Providing a Full-time, Consistent Voice for Ratepayers in the Bankruptcy Court

Based on *In re Public Service Co. of New Hampshire*, 88 B.R. 546 (Bankr. D.N.H. 1988), PG&E argues the attorney general and state agencies are the proper representatives for ratepayers in a utility case. In that case, the bankruptcy court recognized the ratepayers needed a full-time, consistent voice during the proceedings. The court held *ad hoc* intervention would not deal with the many issues that would ultimately shape the plan. The State and its agencies were viewed as the general representative in *Public Service Co. of New Hampshire,* and they were given the job:

> The State of New Hampshire and its regulatory agency (the PUC) are further implicated in this bankruptcy proceeding due to questions concerning the debtors' regulatory compliance within the meaning of 28 U.S.C. § 959, as the debtor prior to any plan of reorganization operates its business, sells assets, and engages in other activities that arguably are subject to the jurisdiction of both of the state regulatory agency and of this federal court. The matter pending before this court concerning refund of consumer deposits which raises questions of state-defined "tariffs", as opposed to questions of paying "prepetition claims" prior to a plan, illustrates this perplexing dichotomy. I therefore agree with the assertion by counsel for the State of New Hampshire that the debtor and the Creditors' Committee

> have their heads "hidden in the sand" when they argue that the State of New Hampshire is not a party in interest in every practical sense in this unique reorganization.

Id. at 555.

The bankruptcy court recognized that certain long standing consumer groups were experienced in advocating for ratepayers and would also provide the court with assistance on important issues through discrete intervention; however, the state attorney general, the PUC and the statutory office of ratepayer advocate were appearing generally on behalf of the public interest. In the instant case, the State of California and its agencies are not appearing based on an assertion of sovereign immunity. It could be argued the State of California has abandoned ratepayers in the bankruptcy case.[4] As an alternative to the State's appearance, a committee broadly representative of virtually all ratepayer constituencies is essential to assure the ratepayers' interests are protected. [5]

C. Even if the State of California Waived Sovereign Immunity, the Attorney General May Not Be the Appropriate Representative for Ratepayers Given Conflicts of Interest Not Present in the Public Service Co. of New Hampshire Case

In *Public Service of New Hampshire*, the bankruptcy court held ratepayers would be adequately represented by the State's attorney general. That holding has no application to this case because the Attorney General of California may have a conflict of interest in

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[4] On April 17, 2001, the California Legislature's Senate Energy, Utilities and Communications Committee (the "California Senate Energy Committee") conducted hearings on the PG&E bankruptcy filing. When discussing the State of California's decision not to waive its Sovereign Immunity, California Senate Energy Committee Chairperson Debra Bowen said:

> What about the PUC's ability to look at the reasonableness of decisions from a ratepayer's standpoint because I think the greatest issue of concern here is that, you know, the utilities don't have any fiduciary or financial obligation to ratepayers. That gets enforced only via PUC review and so to the extent that we decide the PUC is not going to have that review, we decide the ratepayers have, essentially, no protection.

Martin Declaration, Exhibit F, 37:23-38:4 (emphasis added).

[5] The People of the State of California and its agencies such as the California Public Utilities Commission and its commissioners, acting through Attorney General Bill Lockyer, have made no mystery of its intention to hold high its rights of Sovereign Immunity and not to submit to the jurisdiction of the Federal bankruptcy court. On May 1, 2001, the State filed is Amicus Curiae Memorandum of the People of the State of California in Support of Defendants' Motion to Dismiss & in Opposition to Debtor's Request for Injunction asserting the State is immune from Federal process under the 11th Amendment of the United States Constitution and the Supreme Court's decision in *Seminole Tribe of Florida v. Florida,* 571 U.S. 44 (1996).

representing ratepayers. The State of California, through its Department of Water Resources (the "DWR"), is purchasing power for PG&E and billing PG&E for those purchases under AB1X. During April 2001 hearings before the California Legislature's Senate Energy, Utilities and Communications Committee, the Attorney General's bankruptcy lawyer acknowledged the predominance of the State's fiscal concerns, not ratepayers' concerns, in California's approach to the bankruptcy case.[6/]

The divergence of the State and ratepayers' interest is best explained by the adversary proceeding PG&E commenced on May 2, 2001, against the Independent System Operator (the "ISO").[7/] PG&E alleges since the enactment of AB1X, the DWR has purchased power for the State's electricity needs. (ISO Complaint ¶¶ 14 and 31). PG&E claims the DWR has not purchased enough power so the ISO has filled the void by purchasing the most expensive power available on the "spot" market and invoicing that power cost to PG&E. PG&E complains these purchases are diminishing the bankruptcy estate because the cost of the power greatly exceeds the rate PG&E is permitted to charge its rate-paying customers. (ISO Complaint ¶ 35).

The State and PG&E's ratepayers have conflicting interests on this point. The State (through the DWR) has no interest in purchasing the peak power the ISO has acquired because of its high cost – that is why the ISO is purchasing and invoicing the power to PG&E. PG&E claims in the ISO Adversary Proceeding the DWR will pay for only

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[6/] Steven Felderstein, the Attorney General's bankruptcy counsel, testified at the April 17, 2001 California Senate Energy Committee that the State's paramount interest was in maintaining control and authority over the myriad State and CPUC processes and laws governing the conduct of regulated public utilities in California. Mr. Felderstein indicated it was in the State's best interest to avoid submitting to the jurisdiction of the Federal bankruptcy court to preserve those processes and their outcomes. Proceedings of California Senate Energy, Utilities and Communications Committee, April 17, 2001, transcript at 51:6 - 53:4. California Senate Energy Committee Chair Debra Bowen specifically enjoined counsel to ensure that the State's "pecuniary interest" was carefully guarded while preserving the State's sovereign immunity from process. Martin Declaration, Exhibit F, 71:17-25.

[7/] PG&E commenced this adversary proceeding by filing its *Complaint for Injunctive and Declaratory Relief* (the "ISO Complaint") in the matter styled *Pacific Gas and Electric Company v. California Independent System Operator Corporation* (A.P. No. 01-3086 DM).

"reasonable" costs of power.[8/] AB1X requires the DWR be reimbursed for power costs. (ISO Complaint ¶ 26). The CPUC must set a blended rate to account for both PG&E's power costs and the DWR's. *Id.* When that rate is set, the state will have to advocate to repay the DWR for its power purchases, perhaps to the detriment of PG&E and its ratepayers, a conflict of interest created by the state's dual role.

D. The Associations Selected for the Committee are Properly Representative of Ratepayers and Can Act as Their Fiduciary

The associations selected as members of the Official Committee of Ratepayers are broadly representative of all ratepayer's constituencies – large and small businesses, agriculture, local governmental agencies, and residential users. They are well-established organizations with a broad range of purposes and cannot be dismissed as political operatives. Their memberships are widely representative. They support businesses, farmers and consumers on a wide range of matters essential to their existence and financial well-being. They appear before courts and government agencies as well as the legislature. The following are excerpts from their declarations indicating the breadth of their reach:

> 1. **The California School Boards Association** ("CSBA") represents nearly all of California's more than 1,000 school districts, serving nearly 6 million students.
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> 2. **The California Farm Bureau Federation** is a general farm organization representing more than 94,000 members in 56 counties throughout California and represents over 80% of commercial agriculture.
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> 3. **Dairy Institute of California** is a non-profit statewide trade association founded in 1939. The membership accounts for approximately 80% of the fluid milk, cultured and frozen dairy products and cheese manufactured in California.
>
> 4. **Consumers Union** is a nonprofit organization that has been devoted to providing information, education, and counsel about consumer goods and services, including electricity, and the management of family income, since its formation in 1936. Consumers Union engages in a wide variety of judicial, legislative, and administrative actions on behalf of consumers and consumers' interests. It has been appointed to represent the interests of consumers in numerous state and federal rule-making proceedings

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8/ It might be argued AB1X permits the State to pass this cost to the ratepayers through mandated increases by the CPUC. But to date, this has not happened, and it is difficult to believe the State would be interested in the political consequences of increasing rates to cover the very highest priced power and the rates that would be required to pay for that power when it could continue to see these costs invoiced to the bankruptcy estate.

5. **The California Small Business Association (CSBA**) has approximately 187,000 members in the State of California and is the umbrella organization for 77 small business organizations in California including organizations such as the Latin Business Association, Asian Business Association and American Association of Business Persons with Disabilities. CSBA regularly polls its member on public policy issues affecting small business and receives guidance from its California Small Business Roundtable ("CSBRT") which consists of 40 leading small business owners from across the State. CSBRT is a nonprofit public benefit corporation which, among other things, provides general advocacy on behalf of small businesses in California, disseminates information relevant to such businesses and represents the interests of small business before various public agencies.

6. **The California Restaurant Association (CRA**), founded in 1906, is a non-profit trade association representing the interests California's 72,000 restaurants. The membership ranges from the small independent family-run restaurant to corporate-run chain restaurants. California's restaurant industry is one of the State's largest employers with over 900,000 employees. Statewide, the restaurant industry is responsible for $39.6 billion in sales tax revenues to California.

7. **The Utility Reform Network (TURN)** is a nonprofit, 501(c)(3) organization devoted to protecting the interests of residential and small commercial consumers of electricity, natural gas, and telephone services. It has roughly 30,000 members statewide, a majority of whom are residential ratepayers, and many of whom are PG&E's ratepayers. Since its formation in 1973, TURN has consistently participated in proceedings before the CPUC. In numerous CPUC orders, it has been found to meet the requirements under State law to intervene in proceedings on behalf of residential and small commercial ratepayers.

8. **The California Manufactures and Technology Association** represents the interests of large and medium-sized commercial and industrial customers at State regulatory agencies and the legislature. With around 800 members, CMTA promotes policies that are fair to all manufacturing and technology-based companies throughout the State of California, many within PG&E's service territory.

9. **The California City-County Street Light Association** ("CAL-SLA") has represented the Cities and Counties of California before the California Public Utilities Commission since 1981 on electrical rates for street lights and traffic controls. The Cities and Counties in PG&E's service territory spend in excess of 50,000,000.00 annually for such electric services on separate and distinct rate schedules (LS-1, LS-2, LS-3 and TC).

Many also have broad experience and expertise in utility regulatory work. As in the *Dow-Corning* case where the victims' committee consisted of class action lawyers who understood the legal and procedural issues essential to the victims claims, these organizations have a broad legal and factual understanding of the range of PG&E ratepayer claims and interests. The Farm Bureau Association is a good example:

> The focus of Farm Bureau's constituency in connection with Pacific Gas and Electric Company are on those customers taking service on agricultural schedules, estimated at 85,000 separate accounts. Customers typically have multiple accounts, anywhere from 3 to 50, thus estimating the number of

> agricultural operations that are reflected by the accounts is difficult. Those accounts represent all size and nature of agricultural operations, from very small, very specialized operations to large, diversified operations -all spanning the geographic coverage of PG&E's territory. A major usage of electricity for agricultural customers is pumping water for irrigation. The Farm Bureau has an active interest in both aspects. Individual and family farms comprise nearly 80% of the farming and ranching operations in California.
>
> It employs two full-time staff attorneys who specialize in energy matters affecting agriculture. Farm Bureau has maintained a presence on these matters for over 30 years, including participation in a broad range of proceedings at the California Public Utilities Commission.

See Declaration of Karen Norene Mills filed herewith. The declarations for the other organizations contain additional examples.[9]

The court should not adopt PG&E's characterizations of the Ratepayer Committee members. These organizations cannot be dismissed as lobbyists. They serve many of their members interests in many contexts, and, like PG&E and the creditors in this case, they employ lobbyists. Nor should they be labeled as special interests. As a whole, they are a diverse group who have often opposed each other on utility and other matters. Together, they represent the broad spectrum of ratepayers. Most importantly, like the legal representative for future tort victims in *Manville*, they have come to exist solely for the purpose of acting as a fiduciary for the absent ratepayers. They have agreed to put their particular interests aside for a single purpose – to speak for the ratepayers.

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[9] The **California Manufacturers & Technology Association** Energy Committee retains legal counsel and other experts to analyze the financial impacts of electric and natural gas utility rate proposals and presents testimony supporting fair, cost-based rates for California manufacturers. They bring information to the CPUC and the legislature on how policies and rate decisions impact the ability of their members to stay competitive in world markets.

The **California Small Business Association** and California Small Business Roundtable has intervened on behalf of small business owners in a number of proceedings before the California Public Utilities Commission, Federal Energy Regulatory Commission and Federal Communications Commission. These proceedings include the following: San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and California Power Exchange, et al. FERC Dockets EL-00-95-000, EL-98-000, EL-00-104-000, EL-00-107-000, Post-Transition Ratemaking Proceedings for PG&E, SCE and SDG&E, A.99-01-016, et al., Rulemaking Proceeding Regarding Restructuring of California, CPUC Docket No. R98-12-015, Rulemaking Proceeding Regarding Restructuring of California Electric Services Industry, CPUC Docket No. R94-04-031, Rulemaking Proceeding to Establish Rules of Conduct Governing Relationships Between Energy Utilities and Their Affiliates, CPUC Docket No. R.97-04-011, Rulemaking Proceeding to Revise the Regulatory Structure Governing California's Natural Gas Industry, CPUC Docket No.98–1-041.

V. CONCLUSION

The U.S. Trustee properly exercised her discretion in the appointment of the Official Committee of Ratepayers. The appointment is neither arbitrary or capricious. No order vacating the appointment should issue.

Date: May 15, 2001

Respectfully submitted,

Patricia A. Cutler
Assistant United States Trustee

By: _____
Attorneys for United States Trustee
Linda Ekstrom Stanley